LE COPY

Office - Supreme Court
FILED
MAY 27 19
HAROLD B. WILLEY,

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1954

No. 756

PERMANENTE STEAMSHIP CORPORATION,
Petitioner,

vs.

HENRY PETERSON,
Respondent.

On Petition for a Writ of Certiorari to the District Court of Appeal of the State of California, First Appellate District.

BRIEF FOR RESPONDENT IN OPPOSITION.

ALBERT MICHELSON,
1650 Russ Building, San Francisco 4, California.
Counsel for Respondent.

NEWELL J. HOOEY,
Russ Building, San Francisco 4, California,
Of Counsel.

PETER-WALSH PRINTING CO., SAN FRANCISCO

BLEED THROUGH POOR COPY

Subject Index

Page

Opinion below 1

Questions presented 1

Statutes and regulations involved 2

Statement 3

1. Certiorari should be denied for the reason that the decision of the court below was correct, without regard to the questions urged by petitioner, on the ground that respondent was injured because of negligent navigation of the ship 7

2. Certiorari should not be granted to disturb the reasonable construction given Coast Guard Regulation 62.25 by the court below 7

Conclusion 9

Table of Authorities Cited

Cases

	Pages
C. I. R. v. Clark, 7 Cir. 1953, 202 F. 2d 94	9
Intagliata v. Shipowners & Merc. etc. Co., 26 Cal. 2d 365	8
The Jean Jadot, D.C.N.Y. 1943, 2 F. Supp. 942	8
The Oriental Trading & Tsp. Co. Ltd. v. Gulf Oil Corp., 173 F. 2d 108, certiorari denied, 337 U.S. 919	8
Puratich v. United States, 9 Cir. 1942, 126 F. 2d 914	8
Stevens v. United States Lines Co., 1 Cir. 1951, 187 F. 2d 670	8
United States v. The Adrastus, 2 Cir. 1951, 190 F. 2d 883	8

Statutes

46 C.F.R., Section 62.25(a)	2, 3, 6, 7, 9
33 U.S.C., Section 121 (Article 29, International Rules for Navigation at Sea)	2, 8
46 U.S.C., Section 375	3
46 U.S.C., Section 688 (Jones Act)	2

BLEED THROUGH POOR COPY

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1954

No. 756

PERMANENTE STEAMSHIP CORPORATION,
Petitioner,

vs.

HENRY PETERSON,
Respondent.

On Petition for a Writ of Certiorari to the District Court of Appeal of the State of California, First Appellate District.

BRIEF FOR RESPONDENT IN OPPOSITION.

OPINION BELOW.

The opinion of the District Court of Appeal is reported in 129 Cal. App. 2d 579, 277 Pac. 2d 495.

QUESTIONS PRESENTED.

1. Is the decision of the court below correct, without regard to the questions urged by petitioner, on the

ground that respondent was injured because of negligent navigation of the ship?

2. Did the court below correctly decide that the rule of reason must be read into Coast Guard Regulation 62.25?

STATUTES AND REGULATIONS INVOLVED.

46 U.S.C., sec. 688 (Jones Act):

> "Any seaman who shall suffer personal injury in the course of his employment may, at his election maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railroad employees shall apply; and in case of the death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable. Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located."

33 U.S.C., sec. 121 (Article 29 of the International Rules for Navigation at Sea):

> "Nothing in these rules shall exonerate any vessel, or the owner or master or crew thereof, from the consequences of any neglect to carry lights or signals, or of any neglect to keep a

BLEED THROUGH POOR COPY

proper lookout, or of the neglect of any precaution which may be required by the ordinary practice of seamen, or by the special circumstances of the case."

46 U.S.C., sec. 375:

"The Commandant of the Coast Guard shall establish all necessary regulations required to carry out in the most effective manner the provisions of title 52 of the Revised Statutes, and also regulations, prohibiting useless and unnecessary whistling, and such regulations shall have the force of law."

46 CFR, sec. 62.25 (a):

"(a) All vessels navigating the ocean during the nighttime shall have a look-out at all times at or near the bow. Nothing in this section shall exonerate any master or officer in command from the consequences of any neglect to keep a proper look-out or the neglect of any precautions which may be required by the ordinary practice of seamen or by the special circumstances of the case."

STATEMENT.

Respondent was an able-bodied seaman on petitioner's ship Permanente Silverbow when it sailed from Honolulu for the mainland around 10 p.m. of February 27, 1951. R. 8, 23, 278. The ship was empty of cargo and unballasted except aft. R. 179, 242. Respondent had followed the sea for 37 years. R. 5, 8. Commencing at midnight he went on duty as lookout

on the forecastle head. R. 23. The ship was pounding, jumping, pitching, and bouncing. R. 24, 76, 129. As he walked from amidships to the forecastle head he had to brace himself in order to keep his balance. R. 26. He relieved seaman Jones who was then on lookout duty. R. 27, 68. Respondent could not walk and keep his balance at the forecastle head. R. 30. He stationed himself on the steel deck just ahead of the forepeak hatch in the center of the forecastle head. R. 27. In order to support himself he took hold of one of the metal "dogs" by which the hatch cover was clamped or screwed to the top of the hatch. R. 17, 29, 74. Wind conditions prevailing on the forecastle head prevented respondent from standing up closer to the stem of the vessel, and it was so windy that he could not keep his eyes open. R. 74, 75, 79, 80, 88. He remained on the forecastle head clutching the "dog" for about 26 minutes, when a series of 7 or 8 bounces culminated in a tremendous bounce that wrenched respondent away from his hold and caused his injury. R. 30.

According to seaman Jones, whom respondent relieved as lookout, "it was blowing very bad and the ship was hanging" and "bucking the seas," and it was hard to "walk against the wind", and he had to hang on to the gunwale. R. 242-245. Jones said the pitching and pounding steadily got worse. R. 245-246. While on duty he called the bridge by telephone and talked to the master, telling him that it was "pounding and banging real bad", and the master responded by hanging up the telephone. R. 246-247.

BLEED THROUGH POOR COPY

In the opinion of respondent and seaman Jones the conditions prevailing on the forecastle head were such that the ordinary practice of seamen and the special circumstances of the case required the officer on the watch to remove the lookout to the flying or top bridge where he would be protected. R. 45-48, 99-100, 250-253.

Two experienced master mariners expressed the same opinion. R. 166, 195-196, 207, 255, 267-268. One of them said, "Under the circumstances described here, a man isn't capable of maintaining the sort of lookout that is described as to what he should be doing during time he is out there. It isn't humanly possible, when you have to hang on to keep from being thrown down on a steel deck—it isn't humanly possible to maintain a lookout such as is required." R. 207. The other said the lookout should have been stationed up on the bridge, "because it is dangerous for the personnel to keep their footing down there, and for the simple reason when the sea is pounding considerably he couldn't keep a proper lookout, which is the rule of the road—we must maintain a proper lookout. That's one of the most important rules of the road." R. 268.

As a witness for petitioner, the master of the Permanente Silverbow testified that the officers of the ship were vested with discretion to freely move the lookout from the bow or forecastle head to the bridge if the safety of such lookout required it. R. 309-310, 314, 317-318. And as a witness for petitioner a master mariner and retired Coast Guard lieutenant com-

mander testified that the lookout should be removed from the bow "if that particular post has become untenable and can no longer be utilized with full effect —because of the weather." R. 326. And this latter witness also testified that the Coast Guard interpreted its Regulation 62.25 as permitting a lookout to be removed from the bow if his position became untenable, or his function as lookout interfered with so that he could not adequately see ahead. R. 334-335.

In the opinion of one of the experts the speed at which this empty and aft-ballasted ship was being navigated under the conditions prevailing at the time respondent was injured contributed to or increased its pitching and pounding. R. 176-181, 186-187, 188-191.

The District Court of Appeal of the State of California by its decision herein has affirmed a judgment entered upon a jury verdict for respondent in the sum of $6,000.

At the trial of the action the witnesses for both sides agreed that the rule of reason should be read into Coast Guard Regulation 62.25. In affirming the judgment, the District Court of Appeal followed along. The Supreme Court of the State of California also followed along tacitly by denying a petition for hearing. The final effort of petitioner to have the rule of reason read out of the Regulation is the petition for certioriari herein *which actually concedes that the rule of reason must be read into the Regulation.* Pet. p. 15.

BLEED THROUGH POOR COPY

1. **CERTIORARI SHOULD BE DENIED FOR THE REASON THAT THE DECISION OF THE COURT BELOW WAS CORRECT, WITHOUT REGARD TO THE QUESTIONS URGED BY PETITIONER, ON THE GROUND THAT RESPONDENT WAS INJURED BECAUSE OF NEGLIGENT NAVIGATION OF THE SHIP.**

Reference has been made to the testimony of an expert witness that the speed at which the empty and aft-ballasted ship was being navigated under the condition prevailing at the time contributed to or increased the pitching and pounding of the ship. A jury could competently find from such evidence that such negligence either in whole or in part converted the forecastle head into a place which was not reasonably safe for the lookout to work and resulted in respondent's injury. Credibility of witnesses, of course, was a question for the jury. The evidence is therefore ample enough and substantial enough to support a verdict and judgment for respondent on the theory of negligent navigation. Therefore, even if certiorari were granted, this court would in all probability never reach the questions propounded by petitioner.

---

2. **CERTIORARI SHOULD NOT BE GRANTED TO DISTURB THE REASONABLE CONSTRUCTION GIVEN COAST GUARD REGULATION 62.25 BY THE COURT BELOW.**

Reference has been made to the fact that at the trial witnesses for both sides read the rule of reason into Coast Guard Regulation 62.25. All concluded that if a "proper lookout" could not be kept on the forecastle head because of conditions there prevailing, the or-

dinary practice of seamen and the special circumstances of the case required that the lookout be removed from the forecastle head to the flying bridge or some other place where he could qualify as a "proper lookout". The second sentence of the Regulation, earlier quoted, contains that rule or qualification of reason. Its parentage is Article 29 of the International Rules for Navigation at Sea where the same language appears. 33 U.S.C., sec. 121.

The cases are uniform in holding that the rule of reason must be read into rules or regulations as to lookouts and if conditions prevent a "proper lookout" from the bow of the ship, such lookout must and should be kept elsewhere. *United States v. The Adrastus,* 2 Cir. 1951, 190 F. 2d 883, 886; *Stevens v. United States Lines Co.,* 1 Cir. 1951, 187 F. 2d 670, 674; *The Oriental Trading & Tsp. Co. Ltd., v. Gulf Oil Corp.,* 2 Cir. 1949, 173 F. 2d 108, 111; *Puratich v. United States,* 9 Cir. 1942, 126 F. 2d 914, 916; *The Jean Jadot,* D.C.N.Y. 1943, 2 F. Supp. 942, 949; *Intagliata v. Shipowners & Merc. etc. Co.,* 26 Cal. 2d 365, 380. It is enough to quote from *The Oriental Trading & Tsp. Co. Ltd. v. Gulf Oil Corp.,* 173 F. 2d 108, 111 (certiorari denied, 337 U.S. 919):

> "Although a lookout is one of the most essential safeguards on a ship, nothing could less insure his value than rigidly to circumscribe his function. Normally, he should indeed be stationed in the bow; because there his view is not obstructed; and apparently he can see better when close to the water than aloft. However, all such considerations yield, when the weather makes an-

BLEED THROUGH POOR COPY

other position more suitable. It would be fatuous to the last degree to insist upon his being on the forecastle, where rain or sleet even high winds in his face interfere with his vision. Both ships were sheltering their lookouts--a good indication that there was a reasonable precaution."

Administrative rules, of course, must harmonize with statutes and may not be arbitrary or unreasonable. (*C. I. R. v. Clark,* 7 Cir. 1953, 202 F. 2d 94, 98.) The petition for certiorari herein asks this court to so interpret Regulation 62.25 as to defy this general rule. Clearly, certiorari is not merited under the circumstances here disclosed.

CONCLUSION.

Respondent therefore respectfully submits that the petition for certiorari should be denied.

Dated, San Francisco, California,
May 23, 1955.

ALBERT MICHELSON,
Counsel for Respondent.

NEWELL J. HOOEY,
Of Counsel.